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# REPORT AND RECOMMENDATIONS MADE BY THE "D2" PANEL OF COMMISSIONERS CONCERNING PART TWO OF THE EIGHTH INSTALMENT OF INDIVIDUAL CLAIMS FOR DAMAGES ABOVE USD 100,000 (CATEGORY "D" CLAIMS)

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## Introduction

1. This is the third report to the Governing Council of the United Nations Compensation Commission (the "Commission") submitted pursuant to article 38(e) of the Provisional Rules for Claims Procedure (S/AC.26/1992/10) (the "Rules") by the "D2" Panel of Commissioners (the "Panel"), one of two Panels appointed to review individual claims for damages above 100,000 United States dollars (USD) ("category 'D' claims").

2. This report contains the determinations and recommendations of the Panel in respect of part two of the eighth instalment of category "D" claims, comprising 229 claims ("the claims") of the 449 claims in the instalment, submitted to the Panel pursuant to article 32 of the Rules on 30 January 2001.

## I. OVERVIEW OF THE CLAIMS IN PART TWO OF THE EIGHTH INSTALMENT

3. The 229 claims assert losses aggregating USD 309,393,235.63. Most of the loss types defined on the category "D" claim form were encountered in the claims. The most significant loss types appearing in the claims were D4 (personal property) and D7 (real property) losses.

4. Out of the 229 claims, 42 claims were deferred to later category "D" instalments, transferred from category "D" to category "E" or withdrawn. These included 27 claims which require further claim development, 8 shareholder claims which will be processed in accordance with Governing Council decision 123 (S/AC.26/Dec.123 (2001)), and 5 claims that overlap with other category "D" claims.

5. As a result of these deferrals and transfers, the number of claims reviewed by the Panel in part two of the eighth instalment was reduced to 188. Table 1 below sets out by submitting entity the claims in part two of the eighth instalment as submitted to the Panel and the claims as resolved by the Panel. 1/

Table 1. Summary of claims by submitting entity

| Submitting entity | Number of claims submitted to the Panel | Number of claims resolved by the Panel |
|---|---|---|
| Canada | 2 | 1 |
| Egypt | 3 | 3 |
| France | 2 | 2 |
| India | 16 | 15 |
| Israel | 8 | 8 |
| Jordan | 12 | 3 |
| Kuwait | 119 | 94 |
| Lebanon | 2 | 2 |
| Pakistan | 33 | 29 |
| Spain | 1 | 1 |

| Submitting entity | Number of claims submitted to the Panel | Number of claims resolved by the Panel |
|---|---|---|
| Syrian Arab Republic | 1 | 1 |
| Tunisia | 1 | 0 |
| United Kingdom | 9 | 9 |
| United States | 17 | 17 |
| Yemen | 2 | 2 |
| UNHCR Canada | 1 | 1 |
| Total | 229 | 188 |

## II. THE PROCEEDINGS

6. On 25 July 2000, the Panel issued Procedural Order No. 5 in which it gave notice of its intention to complete its review of the claims and to finalise its report and recommendations to the Governing Council in two parts, part one in January 2001 and part two in August 2001. The Panel met regularly to review and consider the claims in this instalment.

7. The Panel has taken into consideration relevant information and views presented by a number of submitting entities and by the Government of the Republic of Iraq ("Iraq") in response to the reports submitted to the Governing Council by the Executive Secretary in accordance with article 16 of the Rules.

8. The Panel has sought to achieve consistency, in so far as is possible, with the verification and valuation procedures adopted by other panels for category "D" and "E" claims. This has been accomplished by adapting the relevant features of related methodologies in the assessment of the claims, where appropriate.

## III. LEGAL FRAMEWORK

### A. Applicable law

9. The Security Council reaffirmed Iraq's liability under international law for any direct loss arising as a result of Iraq's invasion and occupation of Kuwait. Paragraph 16 of Security Council resolution 687 (1991) states that Iraq:

> "... is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait."

10. Article 31 of the Rules identifies the law to be applied by panels of Commissioners in their consideration of claims. Specifically, panels are to apply Security Council resolution 687 (1991) and other relevant Security Council resolutions, the criteria established by the Governing Council for

particular categories of claims, and any pertinent decisions of the Governing Council. Where necessary, panels are to apply other relevant rules of international law.

B. Evidentiary requirements

11. Article 35(1) of the Rules provides that:

> "Each claimant is responsible for submitting documents and other evidence which demonstrate satisfactorily that a particular claim or group of claims is eligible for compensation pursuant to Security Council resolution 687 (1991). Each panel will determine the admissibility, relevance, materiality and weight of any documents and other evidence submitted."

12. Article 35(3) provides that claims in categories "D", "E" and "F" must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss.

13. In addition, decision 15 of the Governing Council expressly requires "detailed factual descriptions of the circumstances of the claimed loss, damage or injury" with respect to "all types of business losses, including losses relating to contracts, transactions that have been part of a business practice or course of dealing, tangible assets and income producing properties." 2/

14. The Panel has reviewed the claims and made its recommendations by assessing documentary and other appropriate evidence provided by the Executive Secretary pursuant to article 32 of the Rules. In addition, the Panel has sought to balance the interests of claimants with the requirement that Iraq is only liable for direct loss, damage or injury caused by the invasion and occupation of Kuwait.

C. Causation

15. Security Council resolution 687 (1991) establishes Iraq's liability for any "direct" loss arising as a result of its invasion and occupation of Kuwait. The Panel has been particularly concerned to ensure that all losses recommended for compensation are direct losses caused by Iraq's invasion and occupation of Kuwait.

16. In dealing with the issue of causation, the Panel has been guided by Governing Council decision 7, which provides that compensation is available with respect to any direct loss, damage, or injury (including death) to individuals as a result of Iraq's invasion and occupation of Kuwait. This will include any loss suffered as a result of:

(a) Military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991;

(b) Departure from or inability to leave Iraq or Kuwait (or a decision not to return) during that period;

(c) Actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation;

(d) The breakdown of civil order in Kuwait or Iraq during that period; or

(e) Hostage taking or other illegal detention. 3/

17. The Governing Council has confirmed that these guidelines are not intended to be exhaustive. 4/ For each claim, the Panel's causation analysis begins with reference to Security Council resolution 687 (1991), and an assessment of whether the claimed loss was a direct result of Iraq's invasion and occupation of Kuwait. The Panel has interpreted Security Council resolution 687 (1991) in accordance with the guidance provided by relevant decisions of the Governing Council. In each case, therefore, the Panel assesses whether the directness requirement has been met based on one of the enumerated circumstances outlined in paragraph 6 of decision 7, or some other causal relationship arising directly from Iraq's invasion and occupation of Kuwait. If a claim or a loss element fails to meet the directness requirement, the Panel recommends no compensation for that claim or loss element.

18. Additionally, the Panel has considered the decisions of other panels of Commissioners dealing with analogous issues of causation. In particular the Panel has drawn upon and adapted the reasoning applied by the "E2" Panel in its report concerning the second instalment of category "E2" claims with regard to the jurisdiction over losses outside of Kuwait. 5/ The Panel has also been guided by paragraph 23 of the report of the "F3" Panel concerning the first instalment of category "F3" claims with regard to what constitutes "direct" loss. 6/

### D. The role of the Panel

19. The Governing Council has entrusted three tasks to the Panel. First, the Panel must determine whether an alleged loss falls within the jurisdiction of the Commission and is compensable in principle. Second, the Panel must verify whether the loss was actually suffered by the claimant. Third, the Panel must determine the amount of any compensable loss suffered by the claimant and recommend an award in respect thereof.

20. Taking into account the evidentiary and causation requirements that must be met by claimants in category "D", and considering the legal principles that must be respected in the valuation of compensable losses, a case-by-case assessment of each claim is required. In summary, the Panel's objective was to review the claims by applying established principles in a consistent and objective manner.

## IV. FACTUAL AND LEGAL ISSUES ARISING IN THE DETERMINATION OF THE CLAIMS IN PART TWO OF THE EIGHTH INSTALMENT

21. The Panel was called upon to address numerous factual and legal questions in the determination of the claims. The Panel does not deem it appropriate to compile an exhaustive list of those issues and the determinations made in respect of each. Instead, the Panel has elected to limit itself to two specific issues, which are discussed below.

A. D8/D9 individual business losses: related or competing claims for the ownership of a business

22. The Panel considered two claims which presented D8/D9 tangible property and lost income claim elements in respect of certain businesses. Upon review, the Panel determined that the two claimants had filed competing claims in respect of certain of those businesses.

23. The Panel directed that detailed claim development be undertaken as to the ownership history of the businesses in question, and concluded that a domestic legal dispute existed regarding certain of these businesses. Following additional claim development, the Panel determines that the claimants shared joint ownership as of 2 August 1990, and therefore recommends that the claimants share equally in the compensation awarded.

B. D8/D9 individual business losses: directness of loss

24. The Panel also considered a claim seeking lost profits in connection with a patent that the claimant had secured in July of 1986, over four years before Iraq's invasion and occupation of Kuwait. The claimant alleged that his ability to exploit the patent was prevented by Iraq's destruction of documents and systems related to the patented device.

25. Following review, the Panel recommends that no compensation be awarded for this claim because the claimant has not established that the losses claimed were a direct result of Iraq's invasion and occupation of Kuwait.

## V. CROSS-CATEGORY ISSUES

A. Overlapping and stand alone claims

26. The Panel has initiated an investigation of the nature and scope of the potential overlap of claims filed by individual claimants in category "D" and claims for compensation in respect of the same losses filed by Kuwaiti corporate claimants in category "E4". This potential overlap issue, in addition to the issue of stand alone shareholder claims, is being assessed in co-operation and consultation with the "D1", "E4" and "E4A" Panels. Pending the results of these investigations, the Panel has decided to defer eight claims in part two of the eighth instalment submitted by non-Kuwaiti shareholders of Kuwaiti corporate entities where a potential overlapping or stand alone claim has been filed.

B. Deductions of category "A", "B" and "C" awards

27. Recommended awards in respect of the claims in this instalment are reported after deduction of category "A", "B" and "C" approved awards made to the same claimants. In some cases, the deduction of a category "C" award constitutes a deduction of a pro-rated amount. This occurs where there are multiple category "C" loss elements, and the "C" award was capped at USD 100,000. In such cases, the "C" award is pro-rated back to the "C" loss elements to reach an amount that can be deducted from the corresponding category "D" award.

## VI. OTHER ISSUES

### A. Currency exchange rate

28. The Commission issues its awards in United States dollars. The Panel determines the appropriate exchange rate applicable to claims expressed in other currencies. The Panel finds that it is not possible to calculate the exchange rate separately for each individual claim. The Panel accordingly adopts the reasoning of the "D1" Panel on this issue. 7/ For claims stated in Kuwaiti dinars, the currency exchange rate to be applied is the rate of exchange in effect immediately prior to Iraq's invasion and occupation of Kuwait (i.e., 1 August 1990) for converting Kuwaiti dinars into United States dollars. For claims stated in currencies other than Kuwaiti dinars or United States dollars, the currency exchange rate to be applied is the average rate in effect for the month of August 1990 for converting those currencies into United States dollars as indicated in the United Nations Monthly Bulletin of Statistics.

### B. Interest

29. In decision 16 (S/AC.26/1992/16), the Governing Council specified that "[i]nterest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award."

30. For category "D" loss types other than D8/D9 individual business losses, the "the date the loss occurred" under Governing Council decision 16 is 2 August 1990 (the date of Iraq's invasion and occupation of Kuwait). Category "D" claims for loss of business income are for losses of income that would have been earned over a period of time. As such, an interest start date of 2 August 1990 for such losses would result in over-compensation for claimants. The Panel accordingly adopts the midpoint of the period for which loss of business income claims have been recommended for compensation as the date of loss for the purpose of calculating interest.

### C. Claim preparation costs

31. A number of category "D" claimants have made claims for claim preparation costs incurred by them, either in amounts specified on the claim form or in general terms. The Panel has been informed by the Executive Secretary of the Commission that the Governing Council intends to resolve the issue of claim preparation costs in the future. Accordingly, the Panel makes no recommendation with respect to compensation for claim preparation costs.

## VII. RECOMMENDED AWARDS

32. Table 2 hereto lists the awards recommended by the Panel for each Government and international organization with claimants included in part two of the eighth instalment. Each Government and international organization will be provided with a confidential list containing the individual recommendations made in respect of its claimants. As will be seen from table 2 below, the Panel recommends a total of USD 32,745,106.63 against a total claimed amount of USD 89,113,869.66 for the 188 claims resolved in this part of the instalment.

Table 2. Recommended awards by submitting entity

| Country | Number of claims recommended for payment | Number of claims not recommended for payment | Amount of compensation claimed (USD) | Amount of compensation recommended (USD) |
|---|---|---|---|---|
| Canada | 0 | 1 | 141,787.25 | 0 |
| Egypt | 2 | 1 | 1,832,223.34 | 87,365.48 |
| France | 0 | 2 | 1,719,395.61 | 0 |
| India | 9 | 6 | 19,027,543.43 | 374,120.74 |
| Israel | 3 | 5 | 3,031,008.00 | 137,340.72 |
| Jordan | 2 | 1 | 2,804,349.78 | 399,302.00 |
| Kuwait | 92 | 2 | 42,687,755.59 | 29,016,844.38 |
| Lebanon | 2 | 0 | 346,421.00 | 202,249.00 |
| Pakistan | 25 | 4 | 6,344,134.93 | 1,631,207.79 |
| Spain | 0 | 1 | 1,852,175.00 | 0 |
| Syrian Arab Republic | 1 | 0 | 188,927.34 | 66,326.56 |
| Tunisia | 0 | 0 | 0 | 0 |
| United Kingdom | 5 | 4 | 2,887,371.32 | 183,371.22 |
| United States of America | 12 | 5 | 2,317,642.53 | 472,602.69 |
| Yemen | 2 | 0 | 3,814,533.00 | 144,432.00 |
| UNHCR Canada | 1 | 0 | 118,601.55 | 29,944.05 |
| Total | 156 | 32 | 89,113,869.66 | 32,745,106.63 |

33. The Panel respectfully submits this report pursuant to article 38(e) of the Rules, through the Executive Secretary of the Governing Council.

Geneva, 30 August 2001

(Signed) K. Hossain
Chairman

(Signed) N. Elaraby
Commissioner

(Signed) I. Suzuki
Commissioner

Notes

1/ The "D2" Panel of Commissioners executed Procedural Order No. 13 to acknowledge the withdrawal of one claim from part two of the eighth instalment of category "D" claims. Formally withdrawn claims such as this are noted as "resolved" for Panel report purposes.

2/ S/AC.26/1992/15, paras. 5 and 10.

3/ S/AC.26/1991/7/Rev.1, para. 6.

4/ Decision 7, paragraph 6 and decision 15, paragraph 6.

5/ "Report and recommendations made by the Panel of Commissioners concerning the second instalment of 'E2' claims", S/AC.26/1999/6.

6/ "Report and recommendations made by the Panel of Commissioners concerning the first instalment of 'F3' claims", S/AC.26/1999/24.

7/ "Report and recommendations made by the Panel of Commissioners concerning part one of the first instalment of individual claims for damages above US$ 100,000 (category 'D' claims)", S/AC.26/1998/1, paras. 61-63.

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